

SWEET CAROLINE: THE BACKSLIDE FROM FEDERAL RULE OF EVIDENCE 613(b) TO THE RULE IN QUEEN CAROLINE'S CASE

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Since 1975, Rule 613(b) of the Federal Rules of Evidence has governed the admission of extrinsic evidence of a prior inconsistent statement in federal court. Rule 613(b) requires the proponent of the prior inconsistent statement to provide the declarant an opportunity to explain or deny it. There is no requirement that the proponent provide that opportunity at any particular time or in any particular sequence.

Rule 613 reflected a change from the common law that had fallen out of fashion in the federal courts. That common law rule, known as the Rule in Queen Caroline's Case, required the proponent of a prior inconsistent statement to confront the declarant witness with the statement on cross-examination before introducing any extrinsic evidence of the prior statement. For a variety of reasons, the Advisory Committee reasoned that the Rule in Queen Caroline's Case constituted an unnecessary encumbrance on cross-examination.

Despite the plain meaning of Rule 613(b), and the clear explanation in the Advisory Committee's Note, a number of federal courts have continued to apply the common law Rule in Queen Caroline's Case, citing assorted rationales for doing so. Their actions have caught the attention of the Advisory Committee on Evidence Rules, which has entertained the idea of amending Rule 613(b) to reflect the common law Rule in Queen Caroline's Case.

All things considered, amending Rule 613(b) to adopt the common law of thirty-five years ago is unwise. The English history behind the Rule in Queen Caroline's Case undermines its credibility. Furthermore, Rule 613(b) accomplishes nearly all of the legitimate policy goals of that common law rule while providing for more effective cross-examination. While there does exist a split among United States courts of appeals, most circuit courts apply Rule 613(b) as intended, and only a minority of circuit courts apply the superseded Rule in Queen Caroline's Case. Rather than amend Rule 613(b) to return to the common law Rule in Queen Caroline's Case, the Advisory Committee should consider amending the Rule to make uniform the application of the Rule as originally intended. At the very least,

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the Advisory Committee should not amend Rule 613(b) to return Queen Caroline to her throne.

INTRODUCTION

*Where it began,
I can't begin to knowin'
But then I know it's growing strong. . . .
Sweet Caroline,
Good times never seemed so good. . . .*
— Neil Diamond¹

To courts pining for a common law rule lost in federal practice since before Congress enacted the Federal Rules of Evidence, “[g]ood times never seemed so good” as when they could freely apply the Rule in Queen Caroline’s Case. Rule 613(b) of the Federal Rules of Evidence, however, intentionally superseded that common law rule.² For more than thirty years, the solution of a minority of such nostalgic courts has been to apply the common law rule despite the plain meaning of Rule 613(b).³ The refusal of these courts to recognize that the Rule in Queen Caroline’s Case is no longer sound federal law has led the Advisory Committee on Evidence Rules to reconsider if the drafters should have just codified the common law rule in the first place.⁴ However, for the many reasons explained below, that would be a mistake.

Since 1975, Rule 613(b) of the Federal Rules of Evidence has governed the admission of extrinsic evidence of a prior inconsistent statement in federal court.⁵ The easiest way to define extrinsic evidence of a prior inconsistent statement is to start with a description of what it is not. When a cross-examiner questions a declarant witness directly about the witness’s own prior statement, extrinsic evidence is not involved.⁶ For example, a cross-examiner asks a witness, “Didn’t you tell the responding officer that your assailant was between 5’8” and 6’0”?” Such questions are permitted as direct evidence of a prior inconsistent statement without limitation under

1. NEIL DIAMOND, *Sweet Caroline*, on SWEET CAROLINE (UNI Records 1969).

2. *See infra* Part II.

3. *See infra* note 157.

4. *See* ADVISORY COMM. ON RULES OF EVIDENCE, AGENDA BOOK 238–39 (April 3, 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2012-04.pdf>.

5. FED. R. EVID. 613(b).

6. *See* ROGER PARK & TOM LININGER, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 5.6 (2012).

Rule 613(a).⁷ When the cross-examiner moves beyond questioning the declarant witness about the prior statement to proving the statement with documentary evidence or calling another witness to recount the declarant witness's prior statement, extrinsic evidence exists and triggers Rule 613(b).⁸ For example, the testimony of the responding officer that the witness had in fact told him that the assailant was between 5'8" and 6'0" is extrinsic evidence of the prior statement.

Rule 613(b) requires the proponent of the prior inconsistent statement to provide the declarant an opportunity to explain or deny it.⁹ There is no requirement that the proponent provide that opportunity at any particular time or in any particular sequence.¹⁰ The Rule further requires that opposing counsel receive a similar opportunity to examine the declarant witness about the statement.¹¹

At the time the Advisory Committee on Evidence Rules drafted the Federal Rules of Evidence, Rule 613 reflected a change from the common law that had fallen out of fashion in the federal courts.¹² That common law rule, known as the Rule in Queen Caroline's Case or the Rule in Queen's Case,¹³ required the proponent of a prior inconsistent statement to confront the declarant witness with the statement on cross-examination *before* introducing any extrinsic evidence of the prior statement.¹⁴ For a variety of reasons, the Advisory Committee reasoned that the Rule in Queen Caroline's Case constituted an unnecessary encumbrance on cross-examination.¹⁵

Despite the plain meaning of Rule 613(b) and the clear explanation in the Advisory Committee's Note,¹⁶ a number of federal courts have continued to apply the common law Rule in Queen Caroline's Case, citing assorted rationales for doing so.¹⁷ The actions of these courts have caught the attention of the Advisory Committee on Evidence Rules.¹⁸ That Committee has entertained the idea of

7. See FED. R. EVID. 613(a).

8. See PARK & LININGER, *supra* note 6.

9. FED. R. EVID. 613(b).

10. See FED. R. EVID. 613(b) advisory committee's note.

11. FED. R. EVID. 613(b).

12. See *infra* note 72.

13. See Leonard J. Stern & Daniel F. Grosh, *A Visit with Queen Caroline: Her Trial and Its Rule*, 6 CAP. U. L. REV. 165, 166 (1976).

14. See *infra* note 51.

15. See *infra* Part II.C.

16. See FED. R. EVID. 613(b) advisory committee's note.

17. See *infra* Part III.B for an extended discussion of those decisions applying the Rule in Queen Caroline's Case after Congress enacted Rule 613(b).

18. See ADVISORY COMM. ON RULES OF EVIDENCE, *supra* note 4.

amending Rule 613(b) to reflect the common law Rule in Queen Caroline's Case.¹⁹

This Article considers the law governing the admission of extrinsic evidence and evaluates the need for amending Rule 613(b) of the Federal Rules of Evidence. Part I explains the history behind the Rule in Queen Caroline's Case from its pronouncement in English Parliament in 1820, through its adoption in the United States, to its modern application, and finally, to the adoption of the Federal Rules of Evidence in 1975.²⁰ Part II examines the application of Rule 613.²¹ In Part III, the Article explains the split among United States courts of appeals, in which most circuit courts apply Rule 613(b) as intended,²² and a minority of circuit courts apply the superseded Rule in Queen Caroline's Case.²³ Part IV suggests that, rather than amend Rule 613(b) to return to the common law Rule in Queen Caroline's Case, the Advisory Committee should take no action concerning the Rule. If the Advisory Committee feels compelled to take action to make uniform the application of the Rule, it should amend the Rule to promote its enforcement as originally intended.²⁴

I. OLD SCHOOL: THE RULE IN QUEEN CAROLINE'S CASE

The Rule in Queen Caroline's Case arose in the House of Lords in 1820 as a procedure devised in the monumental Parliamentary pseudo-criminal divorce proceedings by which Queen Caroline's husband, King George IV, attempted to divest her of her title and her rights.²⁵ Historians Leonard Stern and Daniel Grosh described the proceedings as "involv[ing] nothing more than the foolish and scandalous personal lives of the most ridiculous royal couple in British history."²⁶ The parliamentary mechanism used to divest the Queen "was not even strictly a trial in the legal sense but rather a dusty and archaic legal relic dating from the time of Henry VIII."²⁷

19. *Id.*

20. *See infra* Part I.

21. *See infra* Part II.

22. *See infra* Part III.A.

23. *See infra* Part III.B.

24. *See infra* Part IV.

25. *See, e.g.,* Martin A. Schwartz & John Nicodemo, *Impeachment Methods Illustrated: Movies, Novels, and High Profile Cases*, 28 *TOURO L. REV.* 55, 80 (2012); Stern & Grosh, *supra* note 13, at 167.

26. Stern & Grosh, *supra* note 13, at 167.

27. *Id.*

The divorce was quite a scandal at the time, as both parties, cousins no less,²⁸ apparently maintained many extramarital sexual affairs.²⁹ The King could not obtain a straightforward divorce from the Queen under English law because, as Queen, she was not subject to the jurisdiction of ordinary courts of law.³⁰ Moreover, she could easily defeat any action for divorce that he might have brought in the ecclesiastical courts by filing a countercharge of adultery.³¹ Instead, the King took a more creative route to rid himself of the Queen, using a tremendous amount of political capital to introduce a “bill of pains and penalties” in Parliament that could be passed by majority vote after three readings.³² The bill, if passed, would strip the Queen of her title and divorce her from the King; she could also be sentenced to death for high treason.³³ A non-traditional trial in Parliament accompanied the proceedings and followed the rules of evidence and procedure of the ordinary law courts.³⁴

Prominently at issue during the trial was the character of the Queen herself.³⁵ During the trial, the Queen’s former chambermaid, Louisa Demonte, testified on behalf of the prosecution about the Queen’s romantic adventures throughout Europe.³⁶ On cross-examination, one of Queen Caroline’s barristers, John Williams, questioned Demonte about two earlier letters she had written describing the Queen’s good character: one to her own sister in which Demonte recounted the Queen’s good character and alluded to being bribed to testify against the Queen and another letter to the Queen herself, requesting that the Queen hire her back into service.³⁷ Demonte’s statements in her letters describing

28. *See id.* at 169.

29. *See* Schwartz & Nicodemo, *supra* note 25, at 80.

30. *See* Stern & Grosh, *supra* note 13, at 185.

31. *See* Stern & Grosh, *supra* note 13, at 183–84. To obtain a divorce in England at the time, a disenchanted spouse would first have to successfully petition the ecclesiastical court for a judicial separation. *Id.* at 183. Next, he or she would need to initiate an action for criminal conversation against his or her spouse, based on adultery, in the ordinary law courts and win a judgment for damages. *Id.* Then, the injured spouse could petition Parliament to pass an act dissolving the marriage. *Id.* Obviously, these steps came at great financial cost, a problem easily overcome by the King. *Id.* His problem was that Queen Caroline could easily defeat his claim in the ecclesiastical courts by countercharging adultery. *See id.* at 183–84.

32. *See id.* at 184–85.

33. *See id.* at 185. Infidelity to the King amounted to high treason. *Id.*

34. *See id.* at 187.

35. *See id.* at 189–90.

36. *See id.*; *cf.* Schwartz & Nicodemo, *supra* note 25, at 80 (quoting another source) (noting that the Queen was described by one source as a “sensual wanderer”).

37. Stern & Grosh, *supra* note 13, at 190; *see also* Phillip W. Broadhead, *Why Bias Is Never Collateral: The Impeachment and Rehabilitation of Witnesses in Criminal Cases*, 27 AM. J. TRIAL ADVOC. 235, 252 (2003).

the Queen's upstanding character contradicted her testimony on direct examination.³⁸

Two hours into Williams's cross-examination of Demonte concerning her prior inconsistent statements, the prosecutor objected to the impeachment on the grounds that the best evidence of the contents of the letters was the letters themselves, which Williams had not yet introduced.³⁹ While the court considered the propriety of Williams's cross-examination of Demonte, the Queen's barristers did not argue that to show the witness the extrinsic evidence before confronting her with the letters would disable Williams's ability to effectively discredit her.⁴⁰ Her Majesty's barristers did not raise this argument because Williams had already effectively discredited Demonte for the two hours leading up to the court's ruling that Demonte was entitled to see the letters.⁴¹ As a result, the court did not consider this argument before issuing its now infamous ruling.⁴²

The justices deliberated for only ten minutes and, relying on no precedential authority, announced what would later be called the Rule in Queen Caroline's Case, requiring a cross-examiner to show or read aloud extrinsic evidence of a witness's prior inconsistent statement before questioning the witness about the inconsistency.⁴³ After the court's ruling, Williams showed Demonte the letters and continued his cross-examination.⁴⁴ At the conclusion of the trial and upon the third reading in the House of Lords, the bill passed by only a majority of nine.⁴⁵ Concerned that his political gamble had run out of steam, the King abandoned the bill before sending it to the House of Commons.⁴⁶ The Queen maintained both her title and her marriage until her death.⁴⁷ Shortly after the Rule in

38. See Broadhead, *supra* note 37, at 252; Stern & Grosh, *supra* note 13, at 190.

39. See Stern & Grosh, *supra* note 13, at 191–93. It is true that the best evidence of the letters' contents were the letters themselves. In this case, however, this Best Evidence objection was inapplicable because the contents of the prior statements were not offered to prove the truth of their substance but to impeach the witness's credibility. Applying the Best Evidence Rule in such a case would prevent an attorney from challenging a witness's memory concerning the letters without first refreshing that memory by disclosing the contents of the letters. See *id.* at 198.

40. See *id.* at 191.

41. See *id.*

42. See *id.*

43. See *id.* at 197–98. The rule itself was only one of many rulings on evidence in the course of the proceedings, and, for that reason, it has been confused with many of the other rulings rendered during that trial, including the foundational requirements for authenticating documents and the Best Evidence Rule. *Id.* at 166–67.

44. See *id.* at 193.

45. *Id.* at 196. “[T]he final vote was only 108 in favor of the bill and 99 opposed. . . .” *Id.*

46. See *id.*

47. See *id.*

Queen Caroline's Case gained traction in the United States, England abandoned it in 1854.⁴⁸

Although the Rule took hold in the United States in 1832, at first, U.S. courts rejected opportunities to adopt the Rule in Queen Caroline's Case.⁴⁹ Courts in both Massachusetts and Maine rejected the Rule because it was contrary to U.S. practice—as it had been contrary to English practice before the Queen's trial—and because concerns of fairness could be addressed without putting the witness on notice of the prior inconsistent statement.⁵⁰

As it was first adopted in the United States in 1832, the Rule in Queen Caroline's Case required the proponent of extrinsic evidence of a prior inconsistent statement to read or show the statement to the witness before cross-examining him about the inconsistency.⁵¹ Over the next ten years, many more states followed suit,⁵² and once it was widely disseminated in a leading legal treatise published in 1842, it gained universal acceptance in U.S. courts.⁵³ Unfortunately, the rule explained in that treatise was much more complex than the simple ruling of the court in Queen Caroline's trial.⁵⁴ Instead of describing that simple rule, Simon Greenleaf, the author of the preeminent evidentiary treatise of the time, incorporated several of the court's rulings from that trial into one rule, which combined became known in U.S. common law as the Rule in Queen Caroline's Case.⁵⁵ In addition to requiring the cross-examiner to read or show to the witness extrinsic evidence of a prior

48. See Broadhead, *supra* note 37, at 252; Stern & Grosh, *supra* note 13, at 167 (citing Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, § 24 (Eng.)).

49. See Stern & Grosh, *supra* note 13, at 200 (citing *Ware v. Ware*, 8 Me. 42 (1831); *Tucker v. Welsh*, 17 Mass. (16 Tyng) 160 (1821)).

50. *E.g.*, *Ware v. Ware*, 8 Me. 42 (1831); *Tucker v. Welsh*, 17 Mass. 160 (16 Tyng) (1821); see also Stern & Grosh, *supra* note 13, at 200.

51. *Bellinger v. People*, 8 Wend. 595, 598 (N.Y. Sup. Ct. 1832) (describing Queen Caroline's Case as holding "that a witness could not, upon cross-examination, be asked whether, in a certain letter (admitted to have been written by the witness, and in the hands of the party putting the question) he did or did not make certain statements, or use certain expressions, but that the letter itself must first be read before the cross-examination can be pursued; and such is believed to be the established rule and practice in this state"); see also Schwartz & Nicodemo, *supra* note 25, at 80; Stern & Grosh, *supra* note 13, at 200.

52. *E.g.*, *Lewis v. Post & Main*, 1 Ala. 65 (1840); *Doe ex rel. Sutton v. Reagan*, 5 Blackf. 217 (Ind. 1839); *Franklin Bank of Balt. v. Pa., Del., & Md. Steam Navigation Co.*, 11 G. & J. 28 (Md. 1839); *Sawyer v. Sawyer*, 1 Walker 48 (Mich. Ch. 1842); *Garret v. State*, 6 Mo. 1 (1839); *Sharp v. Emmet*, 5 Whart. 288 (Pa. 1840); *Pierce v. Gilson*, 9 Vt. 216 (1837); see also Stern & Grosh, *supra* note 13, at 200.

53. See Stern & Grosh, *supra* note 13, at 201 (crediting Simon Greenleaf with cementing the Rule in Queen Caroline's Case into the common law of the United States by including the rule in his treatise).

54. See *id.*

55. See *id.* at 199–200.

inconsistent statement before questioning her about the inconsistency, the rule Greenleaf laid out also required the proponent to lay a specific foundation before the introduction of that statement.⁵⁶ As Greenleaf's formulation spread, the U.S. common law surrounding the Rule in Queen Caroline's Case also grew to require the cross-examiner to describe the substance of the statement, to identify the time and place of the statement, and to list the people present when the statement was made.⁵⁷ This particular aspect of the Rule in Queen Caroline's Case is often referred to as the "prior foundation" requirement.

The reasons for adopting the rule in the United States were numerous. They included: (1) preventing unfair surprise and embarrassment to the declarant witness by allowing her the opportunity to deny having made the prior statement;⁵⁸ (2) requiring production of the original statement;⁵⁹ (3) promoting efficiency by allowing the declarant witness to admit to the inconsistency, thus obviating the need for the introduction of the prior inconsistent statement (rendering it cumulative under Rule 403);⁶⁰ and (4) highlighting, through juxtaposition, that a prior inconsistent statement is generally admissible for impeachment only and not as substantive evidence.⁶¹

The downside of such a foundation is that it requires an attorney to show his hand to both opposing counsel and the witness:

[I]f the rule in the Queen's Case is followed, and it is required that the witness first be shown or read the letter, this valuable

56. *See id.*

57. *See, e.g.,* PARK & LININGER, *supra* note 6; 28 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6205 (2d ed. 2012); Stern & Grosh, *supra* note 13, at 200.

58. *See* PARK & LININGER, *supra* note 6.

59. *See* Stern & Grosh, *supra* note 13, at 198. This is essentially an argument in favor of the Best Evidence Rule, Rule 1002 of the Federal Rules of Evidence, which requires production of the original "writing, recording, or photograph" to prove the contents of the writing, recording, or photograph. When introducing extrinsic evidence of a prior inconsistent statement, however, the purpose is to prove the lack of witness credibility rather than to prove the contents of the statement itself. *See id.* Thus, the Best Evidence Rule is not appropriately included in a discussion of Rule 613(b). *See id.*

60. *See, e.g.,* PARK & LININGER, *supra* note 6; Broadhead, *supra* note 37, at 253–54.

61. *See* PARK & LININGER, *supra* note 6. A prior inconsistent statement is hearsay if it is offered to prove the truth of the matter asserted. FED. R. EVID. 801(c). To get past the rule against hearsay, FED. R. EVID. 802, the proponent of a prior inconsistent statement must concede that it is not admissible as substantive evidence. *See* ANTHONY J. BOCCHINO & DAVID A. SONENSHEIN, A PRACTICAL GUIDE TO FEDERAL EVIDENCE: OBJECTIONS, RESPONSES, RULES, AND PRACTICE COMMENTARY 143 (10th ed. 2011). Typically, a court admitting extrinsic evidence of a prior inconsistent statement will provide a limiting instruction to the jury explaining that the evidence is being admitted to reflect on the credibility of the witness and that the jury should not consider it as proof that the content of the statement is true.

chance to test his memory and veracity is lost. A forgetful witness will have his memory of the letter refreshed or corrected, though his memory for the rest of his testimony remains faulty. A lying witness will discover the matters on which he may safely lie and those on which he must equivocate, thus guarding the lie from discovery.⁶²

The Rule in Queen Caroline's Case, then, allows the witness the opportunity to conform her testimony to the prior statement in order to obfuscate the inconsistency.⁶³

As the English had since rejected the Rule in 1854,⁶⁴ several U.S. jurists and legal scholars agreed that U.S. courts should similarly abandon the Rule in Queen Caroline's Case because they decried it as an unnecessary impediment to effective cross-examination.⁶⁵ Professor John Henry Wigmore stated in his treatise in 1904 that, "In the year 1820 an English decision laid down a rule which for unsoundness of principle, impropriety of policy, and practical inconvenience in trials committed the most notable mistake that can be found among the rulings upon the present subject."⁶⁶ Another scholar noted, "For Wigmore, cross-examination was the great legal weapon for truth, and the Rule in the Queen's Case was an insuperable barrier to the most telling use of cross-examination."⁶⁷

Nonetheless, the Rule in Queen Caroline's Case had already taken root in U.S. common law.⁶⁸ Although some form of the Rule remains in at least fourteen states,⁶⁹ Rule 613 of the Federal Rules

62. Stern & Grosh, *supra* note 13, at 198.

63. See PARK & LININGER, *supra* note 6.

64. Norman B. Miller, Our Witness: Testimony at Trial, 6 *Cap. U. L. Rev.* 555, 575 & n.64 (1977).

65. See Stern & Grosh, *supra* note 13, at 167 (quoting 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1259 (Chadbourn rev., 1972); *United States v. Dillard*, 101 F.2d 829, 837 (2d Cir. 1938)) (recounting the criticisms of Dean Wigmore and Judge Learned Hand).

66. Stern & Grosh, *supra* note 13, at 202 (quoting 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1259 (Chadbourn rev., 1972)).

67. *Id.*; see also *id.* at 167 (quoting *United States v. Dillard*, 101 F.2d 829, 837 (2d Cir. 1938)) ("Yet the rule survived as law for over 150 years in this country, despite the withering scorn of such legal giants as Dean Wigmore. . . . Judge Learned Hand once observed that it 'is everywhere more honored in the breach than in the observance.'").

68. See Broadhead, *supra* note 37, at 252; Stern & Grosh, *supra* note 13, at 201–02.

69. The following states have codified the Rule in Queen Caroline's Case: ALASKA R. EVID. 613(b); COLO. R. EVID. 613; CONN. R. EVID. § 6-10; FLA. STAT. § 90.614 (2012); HAW. R. EVID. 613; KY. R. EVID. 613; LA. CODE EVID. ANN. art. 613 (2006); MD. R. 5-613; MINN. R. EVID. 613(b); OHIO R. EVID. 613; PA. R. EVID. 613; TENN. R. EVID. 613; TEX. R. EVID. 613; WASH. R. EVID. 613.

of Evidence superseded it in federal courts when the Evidence Rules were adopted in 1975.⁷⁰

II. MODERN RULE: RULE 613

To evaluate the propriety of amending Rule 613 of the Federal Rules of Evidence to incorporate the Rule in Queen Caroline's Case, as that Rule was applied at U.S. common law, it is necessary to identify the differences between Rule 613 and the Rule in Queen Caroline's Case. The Advisory Committee on Evidence Rules first proposed the Federal Rules of Evidence in 1969, and Congress finally adopted them in 1975.⁷¹ By that time, the Rule in Queen Caroline's Case had fallen out of favor in federal practice.⁷² To that end, the Advisory Committee intentionally omitted the common law rule from Rule 613.⁷³

Rule 613 is broken down into two parts, as follows:

Rule 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Examination.

When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).⁷⁴

Rule 613(a) relates to examining a witness directly about his or her own written or oral prior inconsistent statement. Rule 613(b) focuses on the admissibility of extrinsic evidence of those prior statements.

70. See FED. R. EVID. 613.

71. See Eileen A. Scallen, *Proceeding with Caution: Making and Amending the Federal Rules of Evidence*, 36 SW. U. L. REV. 601, 608–09 (2008).

72. See 1 Michael H. Graham, WINNING EVIDENCE ARGUMENTS: ADVANCED EVIDENCE FOR THE TRIAL ATTORNEY § 613:1 (2006 & Supp. 2010).

73. FED. R. EVID. 613(a)–(b) advisory committee's note.

74. FED. R. EVID. 613.

A. Rule 613(a)

Rule 613(a) did away with the Rule in Queen Caroline's Case as it relates to questioning a witness about his or her own statement.⁷⁵ Under Rule 613(a), a cross-examiner may question a witness directly about his or her own prior inconsistent statement without ever disclosing the content of the prior inconsistent statement.⁷⁶ Out of fairness, however, the cross-examiner must disclose the contents of the prior inconsistent statement to opposing counsel upon request.⁷⁷

Take, for example, a simple car accident in which the driving conditions are a central issue in the case. Paula Plaintiff alleges that Darrell Defendant rear-ended her Pontiac at a stop sign with his Dodge Dart. On direct examination, Paula Plaintiff testified that there was full sun on the well-lit intersection at the time of the accident and that the road was dry. Pursuant to Rule 613(a), defense counsel could cross-examine Paula as follows:

- Q: It's your testimony today that the intersection was lit by full sun at the time of the accident?
- A: Yes.
- Q: And that the road was dry?
- A: Yes.
- Q: You are certain that there was full sun?
- A: Yes.
- Q: And you are certain that the road surface was dry?
- A: Yes.
- Q: But, that's not what you told Mr. Thompson, the insurance adjuster assigned to your case, is it?
- A: Yes, it is.
- Q: You told Mr. Thompson that the road was dry?
- A: Yes.
- Q: And you told Mr. Thompson there was full sun?
- A: Yes.

Pursuant to Rule 613(a), there is no need for defense counsel to put Paula Plaintiff on notice as to what she said to Mr. Thompson and the context in which she said it. The cross-examiner can allow

75. FED. R. EVID. 613(a) advisory committee's note (Rule 613(a) "abolishes this useless impediment to cross-examination"); *see also, e.g.*, 4 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 26.20 (7th ed. 2000); GRAHAM, *supra* note 72; WRIGHT & GOLD, *supra* note 57; Schwartz & Nicodemo, *supra* note 25, at 80.

76. FED. R. EVID. 613(a).

77. *Id.*

the witness enough rope with which to hang herself and only then choose to introduce Mr. Thompson's record of the conversation, which may be inconsistent with Paula's trial testimony. Defense counsel is, nonetheless, required to provide a copy of any written statement to Paula's attorney upon her request.

B. Rule 613(b)

As adopted in 1975 and in its current restyled form, Rule 613(b) officially removed the requirement of a prior foundation for the admission of extrinsic evidence of a prior inconsistent statement. Most notably, Rule 613(b) eliminated the requirement that the witness be given an opportunity to explain or deny the inconsistency *before* a court admits extrinsic evidence of a prior inconsistent statement.⁷⁸ Additionally, a cross-examiner is no longer required to describe the substance of the prior inconsistent statement to the declarant witness, the time and place the statement was made, or the individuals present at the time the statement was made before introducing extrinsic evidence of the statement.⁷⁹ Instead, all that is required is that the impeaching attorney give the declarant witness an opportunity to explain or deny the statement and that opposing counsel receive the opportunity to examine the witness on this subject.⁸⁰ Notably, the majority of federal circuit courts do not require the cross-examiner to call the declarant witness and pose the questions prompting the explanation or denial of the prior inconsistent statement; the Rule is satisfied as long as opposing counsel has the opportunity to do so.⁸¹

The Advisory Committee's Note to Rule 613(b) is quite clear that the timing for laying the foundation is irrelevant; extrinsic evidence of a prior inconsistent statement is admissible whether the proponent lays the foundation before or after introducing the inconsistent statement.⁸² The Note specifies: "The traditional insistence that the attention of the witness be directed to the statement

78. See, e.g., FISHMAN, *supra* note 75; GRAHAM, *supra* note 72; PARK & LININGER, *supra* note 6; WRIGHT & GOLD, *supra* note 57.

79. See WRIGHT & GOLD, *supra* note 57.

80. See *id.*

81. See *id.* For a detailed discussion of who has the burden of providing the declarant an opportunity to explain or deny the inconsistent statement under Rule 613(b), see *infra* notes 203-05 and accompanying text.

82. FED. R. EVID. 613(b) advisory committee's note. Furthermore, "[u]nder this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement." *Id.*

on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence.”⁸³ Therefore, Rule 613(b) explicitly eliminated the prior foundation requirement of the Rule in Queen Caroline’s Case.⁸⁴

Additionally, the Advisory Committee’s Note contemplates that courts will use their discretion to admit, rather than exclude, extrinsic evidence of a prior inconsistent statement where the foundational requirements of Rule 613 cannot be satisfied.⁸⁵ That Note states, “In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge.”⁸⁶ That the discretion the Advisory Committee referenced is the discretion to admit, rather than to exclude, such evidence is apparent from its cross-reference to California Evidence Code § 770.⁸⁷ The Advisory Committee’s Note to California Evidence Code § 770 states, “Where the interests of justice require it, the court may permit extrinsic evidence of an inconsistent statement to be admitted even though the witness has been excused and has had no opportunity to explain or deny the statement.”⁸⁸ The Rule contemplates no discretion to exclude extrinsic evidence of a prior inconsistent statement, such as might justify exclusion of such evidence introduced before the proponent allows the witness to explain or deny the inconsistency, but after the court has excused the otherwise available witness.⁸⁹

Because Rule 613(b) eliminated the requirement that such a foundation be laid *prior* to the admission of extrinsic evidence of a prior inconsistent statement, as had been required under the common law Rule in Queen Caroline’s Case, the impeaching attorney has two options for impeaching a witness under 613(b).⁹⁰ First, the cross-examiner may lay the traditional foundation from Queen Caroline’s Case by providing the declarant witness the opportunity to deny the prior inconsistent statement during cross-examination.⁹¹

83. FED. R. EVID. 613(b) advisory committee’s note.

84. See, e.g., FISHMAN, *supra* note 75; GRAHAM, *supra* note 72; PARK & LININGER, *supra* note 6; WRIGHT & GOLD, *supra* note 57.

85. FED. R. EVID. 613(b) advisory committee’s note.

86. *Id.*

87. *Id.*

88. CAL. EVID. CODE § 770 law revision commission comments (West 2013).

89. FED. R. EVID. 613(b) advisory committee’s note.

90. See, e.g., PARK & LININGER, *supra* note 6; WRIGHT & GOLD, *supra* note 57; Broadhead, *supra* note 37, at 252.

91. See, e.g., FISHMAN, *supra* note 75; WRIGHT & GOLD, *supra* note 57.

Then, the cross-examiner may introduce the prior inconsistent statement. This will then trigger the opportunity for the witness to explain the statement on redirect.

Returning to the car accident between Paula Plaintiff and Darrell Defendant, the first option would play out as follows, in keeping with the Rule in Queen Caroline's case:

Q: It's your testimony today that the intersection was lit by full sun at the time of the accident?

A: Yes.

Q: And that the road was dry?

A: Yes.

Q: You are certain that there was full sun?

A: Yes.

Q: And you are certain that the road surface was dry?

A: Yes.

Q: You remember calling your insurance agent after the accident, don't you?

A: Yes.

Q: And he assigned Mr. Thompson to act as the adjuster in your case?

A: Yes.

Q: And you spoke with Mr. Thompson on August 20, did you not?

A: Yes.

Q: Just three days after the accident?

A: Yes.

Q: But, you told Mr. Thompson that the sky was dark at the time of the accident, didn't you?

A: No.

Q: You also told Mr. Thompson that it had begun to sleet minutes before the accident?

A: No.

Q: And you told Mr. Thompson that the road had started to become slick moments before the accident, isn't that right?

A: No.

(After excusing the witness and calling Mr. Thompson)

Q: Mr. Thompson, did Paula Plaintiff speak to you about the accident?

A: Yes.

Q: What did she say?

A: She told me that the sky was dark at the time of the accident and it had just begun to sleet.

Q: Did she say anything about the condition of the road?

A: Yes. She told me that the road had become slick.

Because defense counsel gave Paula the opportunity to admit or deny having made the statement to Mr. Thompson before introducing extrinsic evidence of that inconsistency, both Rule 613(b) and the Rule in Queen Caroline's Case are accommodated.

Rule 613(b), however, offers an alternative to this first method, which leaves the Rule in Queen Caroline's Case by the wayside. This second option allows the cross-examiner to highlight in-court testimony to set it up for juxtaposition with the prior inconsistent statement without ever mentioning the prior statement.⁹² Then, the cross-examiner can introduce the extrinsic evidence.⁹³ Finally, opposing counsel can recall the declarant witness to provide the opportunity to deny the statement.⁹⁴

Using the example of Paula Plaintiff's cross-examination once again, the second option would unfold as follows:

Q: It's your testimony today that the intersection was lit by full sun at the time of the accident?

A: Yes.

Q: And that the road was dry?

A: Yes.

Q: You are certain that there was full sun?

A: Yes.

Q: And you are certain that the road surface was dry?

A: Yes.

(After excusing the witness and calling Mr. Thompson)

Q: Mr. Thompson, did Paula Plaintiff speak to you about the accident?

A: Yes.

Q: What did she say?

A: She told me that the sky was dark at the time of the accident and it had just begun to sleet.

Q: Did she say anything about the condition of the road?

A: Yes. She told me that the road had become slick.

(After recalling the declarant witness)

Q: You spoke with Mr. Thompson on August 20, did you not?

A: Yes.

Q: Just three days after the accident?

92. See, e.g., FISHMAN, *supra* note 75; WRIGHT & GOLD, *supra* note 57.

93. *Id.*

94. See PARK & LININGER, *supra* note 6.

A: Yes.

Q: You told him that, when you approached the intersection, the sky was dark and had begun to sleet, didn't you?

A: No.

Q: You told him that the road had become slick?

A: No.

This method is wholly appropriate under Rule 613(b), but it would violate the common law Rule in Queen Caroline's Case because defense counsel did not give Paula Plaintiff the opportunity to explain or deny the prior inconsistent statement before introducing extrinsic proof of that prior statement. Defense counsel did not put Paula on notice that he had any such extrinsic evidence, leaving her with just enough rope to hang herself during her initial cross-examination. She learned of the existence of extrinsic evidence of her prior inconsistent statement at the same time that the jury did, making it more difficult for her to deny the inconsistency.

C. *The Role of the Advisory Committee*

The Advisory Committee chose not to codify the Rule in Queen Caroline's Case in Rule 613 for several reasons. First, the time saved by allowing the declarant witness to admit or deny the statement before confronting her with extrinsic evidence of the prior inconsistent statement was minimal, significantly undercutting the oft-cited reason justifying the Rule in Queen Caroline's Case.⁹⁵ Second, a requirement that an impeaching attorney disclose the contents of a prior inconsistent statement to opposing counsel satisfies the concern for preventing unfair surprise to opposing counsel.⁹⁶ Third, a requirement that the proponent of the evidence provide the witness an opportunity to explain or deny an inconsistent statement, either before or after the admission of extrinsic evidence of the witness's prior inconsistent statement, addresses the concern for fairness to the declarant witness.⁹⁷

95. See, e.g., PARK & LININGER, *supra* note 6; Broadhead, *supra* note 37, at 253-54.

96. See United States v. Barrett, 539 F.2d 244, 255 (1st Cir. 1976) (quoting *Rules of Evidence (Supplement): Hearing on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 74-75 (1973) (statement of Edward W. Cleary, Reporter, Comm. on Rules of Practice & Procedure of the Judicial Conf. of the U.S.)).

97. See *id.* (quoting *Rules of Evidence (Supplement): Hearing on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 74-75 (1973) (statement of Edward W. Cleary, Reporter, Comm. on Rules of Practice & Procedure of the Judicial Conf. of the U.S.)).

These reasons are compounded by the questionable policy behind the initial adoption of the Rule in Queen Caroline's Case and the swiftness with which England dispensed with its newly created rule, as discussed in Part I of this Article.⁹⁸ Additionally, at the time it was first adopted, the Rule in Queen Caroline's Case represented a departure from U.S. common law; it was initially rejected by several jurisdictions⁹⁹ before being adopted by New York¹⁰⁰ and eventually other state and federal courts. Moreover, the Rule in Queen Caroline's Case was no longer even followed in federal practice by 1969 when the Federal Rules of Evidence were drafted.¹⁰¹

Finally, the common law rule denied the jury the significant benefit of assessing the declarant's credibility without forewarning the declarant witness that she may be backing herself into a corner.¹⁰² John Henry Wigmore himself vehemently criticized the Rule in Queen Caroline's Case for impeding the abilities of a cross-examiner. Wigmore extolled, as scholar Tom Lininger put it, the art of cross-examination as "our greatest invention for truth-seeking."¹⁰³ Professor Lininger noted that "Cross-examination is the purest expression of our adversarial process. It is the highlight of the trial for both jurors and lawyers. It is the moment in litigation when the best lawyers distinguish themselves."¹⁰⁴

The recent Supreme Court decision in *Crawford v. Washington*¹⁰⁵ affirmed the importance of cross-examination. In that case, the Court explained that "the vital importance of the rule securing the right of cross-examination" has been "burned into the general consciousness."¹⁰⁶ According to Professor Lininger:

Justice Scalia [in *Crawford*] lauded cross-examination as our best tool for testing the veracity of witnesses. Yet cross-examination is not simply a means to an end, wrote Justice Scalia. It is an end in itself. There may be other possible methods of

98. See *supra* Part I for further discussion of the initial adoption of the Rule in Queen Caroline's Case.

99. See Stern & Grosh, *supra* note 13, at 200 (citing *Ware v. Ware*, 8 Me. 42 (1831); *Tucker v. Welsh*, 17 Mass. (16 Tyng) 160 (1821)).

100. *Bellinger v. People*, 8 Wend. 595, 598 (N.Y. Sup. Ct. 1832).

101. See GRAHAM, *supra* note 72.

102. See Stern & Grosh, *supra* note 13, at 198.

103. Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1353 (2005) (citations omitted).

104. *Id.*

105. 541 U.S. 36 (2004).

106. Lininger, *supra* note 103, at 1354 (quoting *Crawford*, 541 U.S. at 46).

ascertaining truth, but they cannot supplant cross-examination. Indeed, in a criminal trial, a defendant's right to cross-examination is no less sacred than his right to a jury trial.¹⁰⁷

In drafting Rule 613(b), the Advisory Committee had determined that the costs of impeding cross-examination outweighed the benefits of the Rule in Queen Caroline's Case.

III. A CIRCUIT SPLIT: COMPETING INTERPRETATIONS OF RULE 613(b)

It is clear that the Advisory Committee on Evidence Rules intended Rule 613(b) to eliminate any prior foundation requirement that existed at common law attributable to the Rule in Queen Caroline's Case.¹⁰⁸ Moreover, the Advisory Committee intended that, if courts would exercise any discretion in applying Rule 613(b), that discretion would favor the admission, rather than exclusion, of extrinsic evidence of prior inconsistent statements.¹⁰⁹ Nonetheless, a number of U.S. courts of appeals have affirmed decisions of federal district courts excluding extrinsic evidence of a prior inconsistent statement where the impeaching party failed to lay a prior foundation.¹¹⁰ Those courts have distinguished themselves from the U.S. courts of appeals that have consistently applied Rule 613(b) without imposing a prior foundation requirement as the Advisory Committee originally intended.¹¹¹ Over the past thirty-five years, a circuit split has developed.¹¹²

107. *Id.* (quoting *Crawford*, 541 U.S. at 61–62).

108. *See supra* notes 78–84 and accompanying text.

109. *See supra* notes 85–89 and accompanying text.

110. *See infra* note 157.

111. *See infra* note 113.

112. The following U.S. courts of appeals apply Rule 613(b) to allow admission of extrinsic evidence of a prior inconsistent statement where the proponent of the statement did not lay a prior foundation during cross-examination, but the declarant witness remained available for recall by opposing counsel: First Circuit, *United States v. Hudson*, 970 F.2d 948, 956 (1st Cir. 1992); *United States v. Barrett*, 539 F.2d 244, 254–56 (1st Cir. 1976); Fifth Circuit, *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 533 (5th Cir. 1986); Sixth Circuit, *United States v. McCall*, 85 F.3d 1193, 1197 (6th Cir. 1996); *United States v. McGuire*, 744 F.2d 1197, 1204 (6th Cir. 1984); Seventh Circuit, *United States v. Della Rose*, 403 F.3d 891, 903 (7th Cir. 2005); *United States v. Marks*, 816 F.2d 1207, 1210–11 (7th Cir. 1987); Ninth Circuit, *United States v. Young*, 86 F.3d 944, 949 (9th Cir. 1996); and Eleventh Circuit, *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521–22 (11th Cir. 1986) (affirming exclusion of prior inconsistent statement but only because witness was not available for recall to explain or deny the statement after being excused from cross-examination). Notably, the Seventh Circuit also decided *United States v. Elliott*, 771 F.2d 1046, 1050 (7th Cir. 1985) (requiring prior foundation without providing any explanation for deviating from precedent), which is an aberration among the other precedent in that Circuit.

A. *The Majority View: Rule 613(b) Does not Require a Prior Foundation*

The majority of U.S. courts of appeals apply Rule 613(b) pursuant to its plain meaning and to the meaning prescribed by the Advisory Committee's Note—namely, without imposing a prior foundation requirement.¹¹³ However, these appellate courts often note that they do not condone the practice of “sandbagging”¹¹⁴ to introduce extrinsic evidence of a prior inconsistent statement.¹¹⁵

The following U.S. courts of appeals require a prior foundation even where the declarant is available for recall by either party: Second Circuit, *United States v. DiNapoli*, 557 F.2d 962, 965 (2d Cir. 1977); Fourth Circuit, *U.S. v. Truslow*, 530 F.2d 257, 263 (4th Cir. 1975); Eighth Circuit, *United States v. Schnapp*, 322 F.3d 564, 571–72 (8th Cir. 2003); *United States v. Dierling*, 131 F.3d 722, 733 (8th Cir. 1997); *United States v. Sutton*, 41 F.3d 1257, 1260 (8th Cir. 1994); and Tenth Circuit, *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989). The U.S. Court of Appeals for the Third Circuit has a unique interpretation of Rule 613(b), which does not require a prior foundation as long as the witness is not only available for recall to explain or deny the statement, but where the proponent of the statement takes advantage of that opportunity and recalls the witness. *E.g.*, *United States v. Green*, 556 F.3d 151, 158 (3d Cir. 2009); *United States v. Stewart*, 179 F. App'x 814, 821–22 (3d Cir. 2006); *United States v. DeLaurentis*, 47 F. App'x 170, 172 (3d Cir. 2002) (citing *DiNapoli*, 557 F.2d at 965).

113. *E.g.*, *Della Rose*, 403 F.3d at 903 (determining extrinsic evidence of prior inconsistent statement should have been admitted although impeaching party failed to confront witness with inconsistency on cross-examination); *United States v. Moore*, 149 F.3d 773, 781–82 (8th Cir. 1998) (affirming trial court's admission of prior inconsistent statement after witness's cross-examination where court allowed recall of the witness in surrebuttal as “consistent with the plain language of Rule 613(b)"); *Young*, 86 F.3d at 949 (9th Cir. 1996) (affirming admission of extrinsic evidence of prior inconsistent statement where witness was not confronted on cross-examination but witness was available for recall); *McCall*, 85 F.3d at 1197 (finding extrinsic evidence of prior inconsistent statement admissible even after cross-examination where witness is available for recall); *Hudson*, 970 F.2d at 956 (finding that court should have admitted extrinsic evidence of prior inconsistent statement although impeaching party did not confront witness with inconsistency during cross-examination); *Theriot*, 783 F.2d at 533 (permitting introduction of extrinsic evidence of prior inconsistent statement before confronting witness with inconsistency later in same cross-examination); *McGuire*, 744 F.2d at 1204 (ruling extrinsic evidence of prior inconsistent statement was admissible although it was not introduced until after declarant witness was excused because he was available for recall on rebuttal); *Barrett*, 539 F.2d at 254–56 (where there is no demonstration of witness's unavailability for recall, extrinsic evidence of prior inconsistent statement is admissible even after cross-examination).

114. “Sandbagging” is the ill-received practice of cross-examining a witness with full knowledge of the witness's prior inconsistent statement, making no reference to such statement during the cross-examination, then raising the prior statement for the first time when the proponent of the statement may next call witnesses. *See* FISHMAN, *supra* note 75.

115. *See, e.g.*, *McCall*, 85 F.3d at 1197 (quoting *McGuire*, 744 F.2d at 1204); *McGuire*, 744 F.2d at 1204 (“We do not approve of the government's not informing the defendants of this evidence [of a prior inconsistent statement], which we view as a questionable trial tactic. . . . In any event, the prosecution should have confronted the witness with this statement. Defendants, however, were offered the opportunity to call surrebuttal witnesses.”); *Barrett*, 539 F.2d at 255–56 (“[W]hile good practice still calls for the laying of a foundation, one is not absolutely required. It would have been desirable for defense counsel to have asked [the witness] on cross-examination if he had made the purported statement. . . .”).

Despite this concern about sandbagging, these courts have complied with Rule 613(b). Where the witness remained available for recall, courts have admitted evidence of a witness's prior inconsistent statements that the proponent introduced after the court had excused the witness.¹¹⁶ In fact, a witness's availability for recall has been central to courts' decisions to follow Rule 613(b) and not enforce the prior foundation requirement of the Rule in *Queen Caroline's Case*.¹¹⁷

In one of the earliest federal appellate cases applying the newly adopted Rule 613(b), *United States v. Barrett*, the U.S. Court of Appeals for the First Circuit reversed the trial court's decision to exclude extrinsic evidence of a prior inconsistent statement.¹¹⁸ A jury had convicted Arthur Barrett for stealing and reselling a museum's collection of postage stamps.¹¹⁹ A key witness at trial was Buzzy Adams, who testified on direct examination for the government concerning a conversation between Adams and Barrett in October 1974.¹²⁰ According to Adams's testimony, Barrett admitted to Adams that he had committed the crimes alleged.¹²¹ During its cross-examination of Adams, the defense did not question Adams about an earlier statement that he made to Thomas Delaney in November 1974, which Jeanne Kelley overheard, to the effect that Barrett had nothing to do with the crime.¹²² In its case-in-chief, the defense attempted to call Delaney and Kelley to provide extrinsic evidence of Adams's prior inconsistent statement.¹²³ The trial court, however, excluded the testimony of Delaney and Kelley upon objection by the government, ruling that the defense had failed to lay a prior foundation for the admission of extrinsic evidence of a prior inconsistent statement during its cross-examination of Adams.¹²⁴

The First Circuit found that the trial court erred in so ruling.¹²⁵ It recognized that the common law that developed from the Rule in

116. See, e.g., *Della Rose*, 403 F.3d at 903 ("But the rule itself says only that the witness must have the opportunity to explain or deny his prior statement; it does not say that he must be given that opportunity *before* extrinsic evidence of the statement is admitted. . . . [T]he government could have brought [the witness] back to the stand in its rebuttal case and asked him about the statement at that time."); *Moore*, 149 F.3d at 781; *Young*, 86 F.3d at 949; *McCall*, 85 F.3d at 1197; *Hudson*, 970 F.2d at 956; *McGuire*, 744 F.2d at 1204; *Barrett*, 539 F.2d at 254-56.

117. See *supra* note 116.

118. 539 F.2d at 254-56.

119. *Id.* at 245.

120. *Id.* at 254 n.9.

121. *Id.*

122. *Id.* at 254.

123. *Id.* at 253-54.

124. *Id.*

125. *Id.* at 254-55.

Queen Caroline's Case would have required defense counsel to "lay a foundation for introducing extrinsic evidence of the statement by first directing Adams'[s] attention to the occasion of the alleged contradictory statement and asking him if he made it."¹²⁶ Nonetheless, the court continued, "It is clear . . . that Fed. R. Evid. 613(b) has relaxed any absolute requirement that this practice be observed, only requiring instead that the witness be afforded at some time an opportunity to explain or deny, and for further interrogation."¹²⁷ The court further held that this requirement of providing the witness an opportunity to explain or deny the inconsistency was satisfied even if the witness was never actually confronted with the prior inconsistent statement, as long as the witness was available for recall, whether or not opposing counsel took advantage of the ability to recall the witness.¹²⁸

In support of its position, the court relied on the testimony of the Reporter of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.¹²⁹ The Reporter explained the objectives of the prior foundation requirement of the Rule in Queen Caroline's Case as threefold:

- (1) to save time, since the witness may admit having made the statement and thus make the extrinsic proof unnecessary;
- (2) to avoid unfair surprise to the opposite party by affording him an opportunity to draw a denial or explanation from the witness; and
- (3) to give the witness himself, in fairness, a chance to deny or to explain the apparent discrepancy.¹³⁰

The Reporter, however, noted that the first of these objectives was insignificant, stating, "[T]he time saved is not great; the laying of the foundation may inadvertently have been overlooked; the impeaching statement may not have been discovered until later; and

126. *Id.* at 254.

127. *Id.* at 254–55.

128. *Id.* at 255–56; *see also, e.g.*, *U.S. v. Della Rose*, 403 F.3d 891, 903 (7th Cir. 2005); *U.S. v. McGuire*, 744 F.2d 1197, 1204 (6th Cir. 1984).

129. *Barrett*, 539 F.2d at 255.

130. *Id.* (quoting *Rules of Evidence (Supplement): Hearing on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 74–75 (1973) (statement of Edward W. Cleary, Reporter, Comm. on Rules of Practice & Procedure of the Judicial Conf. of the U.S.)).

premature disclosure may on occasion frustrate the effective impeachment of a collusive witness.”¹³¹ The First Circuit adopted the Reporter’s reasoning that the last two objectives could be equally achieved under Rule 613(b) as under the common law, as long as the witness was given the opportunity to explain or deny the inconsistency at some point during the trial.¹³² The First Circuit also considered that trial courts have discretion to admit an unavailable witness’s impeaching statement if the “interests of justice . . . warrant dispensing entirely with the opportunity to explain or deny.”¹³³

Ultimately, the First Circuit determined that the trial court erred in excluding the testimony of Delaney and Kelley.¹³⁴ It relied on the fact that the government could have recalled Adams to explain or deny the alleged inconsistency after Delaney and Kelley offered extrinsic evidence of the prior inconsistent statement.¹³⁵ The court noted that “the [district] court dismissed the evidence out of hand and made no inquiry into Adams’[s] availability.”¹³⁶ If Adams could have been recalled, the government could have given him the opportunity to explain or deny the inconsistency in satisfaction of Rule 613(b).

In *United States v. McGuire*, the United States Court of Appeals for the Sixth Circuit found no error in the trial court’s admission of extrinsic evidence of a prior inconsistent statement after the witness had been excused.¹³⁷ That case involved the criminal trial of Leo McGuire, the President and CEO of the First National Bank of Grayson, surrounding the fraudulent use of funds from the Kentucky Housing Corporation’s Loans to Lenders Program intended to provide low interest mortgages to low income Kentuckians.¹³⁸ During the trial, the defense presented the testimony of W.H. Dysard concerning the defendant’s good faith use of the funds in

131. *Id.* (quoting *Rules of Evidence (Supplement): Hearing on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 74-75 (1973) (statement of Edward W. Cleary, Reporter, Comm. on Rules of Practice & Procedure of the Judicial Conf. of the U.S.)).

132. *See id.* (quoting *Rules of Evidence (Supplement): Hearing on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 74-75 (1973) (statement of Edward W. Cleary, Reporter, Comm. on Rules of Practice & Procedure of the Judicial Conf. of the U.S.)).

133. *Id.* (quoting *Rules of Evidence (Supplement): Hearing on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 74-75 (1973) (statement of Edward W. Cleary, Reporter, Comm. on Rules of Practice & Procedure of the Judicial Conf. of the U.S.)).

134. *Id.* at 256.

135. *Id.*

136. *Id.*

137. *United States v. McGuire*, 744 F.2d 1197, 1204 (6th Cir. 1984).

138. *Id.* at 1199.

question.¹³⁹ Dysard testified on direct examination that he first learned of the grand jury investigation in October 1980, but that he had been aware of an ongoing investigation before that point.¹⁴⁰ The government did not confront Dysard with any prior inconsistent statement during cross-examination, and he was excused.¹⁴¹ In its rebuttal case, the government called FBI Agent Goode to testify that, on November 19, 1980, Dysard told him that he had “just become aware of the ‘situation’” and that he had no additional knowledge about any investigation.¹⁴²

The Sixth Circuit recognized that, under the common law, the government would have been required to confront Dysard with the prior inconsistent statement during cross-examination.¹⁴³ It further recognized that Rule 613(b) contains no such requirement of a prior foundation.¹⁴⁴ Since the defendants were offered the chance to call Dysard in surrebuttal, however, the court found that the opportunity to admit or deny the statement, as contemplated by Rule 613(b), had been satisfied.¹⁴⁵ The court noted that “[h]ad this point been of great importance, they would have made arrangements to return Dysard to the stand but they did not do so.”¹⁴⁶

In *United States v. Della Rose*, the U.S. Court of Appeals for the Seventh Circuit reached a similar result.¹⁴⁷ In that case, attorney Steven Della Rose was convicted on charges stemming from seeking to obtain a false identification card in the name of a client to enable Della Rose’s employee, Dennis Ilenfeld, to cash a settlement check in the client’s name on behalf of Della Rose.¹⁴⁸ During the trial, Richard Britz, a former client of Della Rose, testified for the government that Della Rose had arranged for him to obtain a false identification card after his driver’s license was suspended.¹⁴⁹ On cross-examination, the defense did not question Britz about any prior inconsistent statements.¹⁵⁰ The trial court later excluded Frank DeFrancesco’s testimony that Britz procured his false identification from Ilenfeld, not Della Rose.¹⁵¹

139. *Id.* at 1203.

140. *Id.*

141. *Id.* at 1203–04.

142. *Id.* at 1204.

143. *Id.*

144. *See id.*

145. *Id.*

146. *Id.*

147. 403 F.3d 891 (7th Cir. 2005).

148. *Id.* at 894.

149. *Id.* at 899.

150. *Id.* at 903.

151. *Id.* at 900.

The Seventh Circuit reversed and noted that Rule 613(b) “says only that the witness must have the opportunity to explain or deny his prior statement; it does not say that he must be given that opportunity *before* extrinsic evidence of the statement is admitted.”¹⁵² The court continued, “[T]he fact that Britz had not been asked about his statement to DeFrancesco on cross-examination did not necessarily preclude the defense from eliciting testimony from DeFrancesco about the statement; the government could have brought Britz back to the stand in its rebuttal case and asked him about the statement at that time.”¹⁵³

The reasoning in *Barrett*, *McGuire*, and *Della Rose* is common to those cases applying Rule 613(b) as written.¹⁵⁴ It is consistent with the plain meaning of the Rule, which imposes no time constraint or sequence in introducing prior inconsistent statements.¹⁵⁵ Moreover, this interpretation is consistent with the Advisory Committee’s Note.¹⁵⁶ The majority of courts of appeals, thus, honor both the letter and intent of the Rule.

B. *The Minority View: Long Live Queen Caroline!*

Despite the plain meaning of Rule 613(b), four U.S. courts of appeals have affirmed district court decisions excluding prior inconsistent statements where the proponent of the statement failed to lay a prior foundation.¹⁵⁷ No circuit is more frequently cited for

152. *Id.* at 903.

153. *Id.*

154. *See supra* note 113.

155. FED. R. EVID. 613(b).

156. FED. R. EVID. 613(b) advisory committee’s note.

157. *E.g.*, *United States v. Schnapp*, 322 F.3d 564, 571–72 (8th Cir. 2003) (affirming trial court’s exclusion of extrinsic evidence of prior inconsistent statement where witness had not been confronted on cross-examination, although he was available for recall); *United States v. Dierling*, 131 F.3d 722, 733 (8th Cir. 1997) (“Rule 613(b) allows impeachment by prior inconsistent statement only when a witness is first provided an opportunity to explain the statement.”); *United States v. Sutton*, 41 F.3d 1257, 1260 (8th Cir. 1994) (describing as “proper” the requirement of an opportunity for the declarant witness to explain or deny a prior inconsistent statement during cross-examination); *United States v. Hudson*, 970 F.2d 948, 956 n.2 (1st Cir. 1992) (maintaining rule that Rule 613(b) does not require prior opportunity to explain or deny, but noting that Rule 611(a) does give trial courts discretion to require prior foundation “when such an approach seems fitting”); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989) (finding that, under Rule 613(b), “before a prior inconsistent statement may be introduced, the party making the statement must be given the opportunity to explain or deny the same”); *United States v. Marks*, 816 F.2d 1207, 1210–11 (7th Cir. 1987) (affirming trial court’s exclusion of extrinsic evidence of prior inconsistent statement to avoid jury confusion); *United States v. Elliott*, 771 F.2d 1046, 1050 (7th Cir. 1985) (affirming exclusion of extrinsic evidence of prior inconsistent statement where declarant had not been confronted with inconsistency on cross-examination); *United States v.*

the proposition that extrinsic evidence of a prior inconsistent statement should be excluded if the witness is not confronted with the inconsistency on cross-examination than the U.S. Court of Appeals for the Eighth Circuit.¹⁵⁸ The Eighth Circuit's 2003 decision in *United States v. Schnapp*¹⁵⁹ is representative of the reasoning for imposing the traditions of the Rule in Queen Caroline's Case despite the plain meaning of Rule 613(b).¹⁶⁰

In *Schnapp*, Christopher Schnapp appealed his arson conviction.¹⁶¹ During the trial, the government presented the testimony of Jim Schuhmacher, an investigator with the local prosecutor's office, stating that the fire originated on the *floor* of the furnace room and was deliberately set.¹⁶² Defense counsel did not question Schuhmacher about a prior inconsistent statement during his cross-examination.¹⁶³ On the direct examination of Schnapp, however, defense counsel attempted to question him about a conversation between Schuhmacher and Schnapp immediately after the fire.¹⁶⁴

DiNapoli, 557 F.2d 962, 965 (2d Cir. 1977) (affirming decision of trial court refusing to allow recall of witness to provide opportunity to explain or deny extrinsic evidence of bias); *United States v. Alvarez*, No. 91 CR 279-5, 1991 WL 259008, at *2 (N.D. Ill. Nov. 6, 1991) (citing *Marks* as requiring impeaching party to first show extrinsic evidence of prior inconsistent statement to witness to prevent jury confusion); *see also, e.g.*, FISHMAN, *supra* note 75; PARK & LININGER, *supra* note 6 (finding that the trial court has discretion under Rule 611(a), as well as the Advisory Committee Note, to exclude extrinsic evidence of a prior inconsistent statement where the prior foundation was not laid); WRIGHT & GOLD, *supra* note 57 ("[W]here the potential costs of abandoning the traditional approach are high, the courts and commentators conclude there is power under Rule 611(a) to require the impeaching party to adhere to the traditional approach or risk exclusion of the prior inconsistent statement under Rule 403." (citations omitted)).

158. *See, e.g., Schnapp*, 322 F.3d at 571-72 (affirming trial court's exclusion of extrinsic evidence of prior inconsistent statement where witness had not been confronted on cross, although he was available for recall); *Dierling*, 131 F.3d at 733 ("Rule 613(b) allows impeachment by prior inconsistent statement only when a witness is first provided an opportunity to explain the statement."); *Sutton*, 41 F.3d at 1260 (describing as "proper" the act of giving the declarant witness the opportunity to explain or deny a prior inconsistent statement during cross). *But see* *United States v. Moore*, 149 F.3d 773, 781-82 (8th Cir. 1998) (affirming trial court's admission of prior inconsistent statement after witness's cross-examination where court allowed recall of the witness in surrebuttal as "consistent with the plain language of Rule 613(b)").

159. 322 F.3d 564 (8th Cir. 2003).

160. *See, e.g., Sutton*, 41 F.3d at 1260 (demanding that the declarant witness receive an opportunity to explain or deny a prior inconsistent statement during cross and before the admission of extrinsic evidence); *Elliott*, 771 F.2d at 1050 (affirming exclusion of extrinsic evidence of a prior inconsistent statement where the declarant had not been confronted with the inconsistency on cross-examination); *DiNapoli*, 557 F.2d at 965 (affirming decision of trial court refusing to allow recall of witness to provide opportunity to explain or deny extrinsic evidence of bias).

161. *Schnapp*, 322 F.3d at 565.

162. *Id.* at 566-67.

163. *Id.* at 569.

164. *Id.*

The trial court excluded this line of questioning on the government's objection because the defense had failed to first confront Schuhmacher with his prior inconsistent statement on cross-examination.¹⁶⁵ The defense made an offer of proof that Schnapp would testify that he spoke with Schuhmacher immediately after the fire, and Schuhmacher opined at that time that the fire originated in the *ceiling* of the furnace room.¹⁶⁶ Schnapp appealed the court's ruling on the basis that Schuhmacher was available for recall to explain or deny the inconsistent statement.¹⁶⁷

Considering the text of Rule 613(b), as well as the accompanying Advisory Committee's Note, the Eighth Circuit explained that under Rule 613(b), a witness's prior inconsistent statement can be introduced for impeachment before the witness is cross-examined concerning the statement.¹⁶⁸ Furthermore, this impeachment evidence can be introduced "even if the witness is never afforded an opportunity to explain or deny the alleged statement."¹⁶⁹ The court, nonetheless, concluded without explanation that admitting extrinsic evidence of a prior inconsistent statement after the available witness has been excused is optional; a district court is not required to do so.¹⁷⁰

165. *Id.*

166. *Id.* at 569–70.

167. *Id.* at 570.

168. *Id.* at 571 (noting that Rule 613(b) does not require the cross-examination of a witness about an inconsistent statement to occur prior to the statement being introduced as evidence for impeachment).

169. *Id.* at 571.

170. *Id.* at 571–72 (relying on *United States v. Sutton*, 41 F.3d 1257, 1260 (8th Cir. 1994)). The court in *Schnapp* relied heavily on its previous decision in *United States v. Sutton*, 41 F.3d 1257, 1260 (8th Cir. 1994), as have other courts imposing the requirement of a prior foundation for the admission of extrinsic evidence of a prior inconsistent statement. *Schnapp*, 322 F.3d at 571; *see, e.g.*, *United States v. Dierling*, 131 F.3d 722, 732 (8th Cir. 1997) (relying on *Sutton*'s interpretation of Rule 613(b) to require a prior foundation).

Unfortunately, the Eighth Circuit in *Sutton* failed to interpret the text or Advisory Committee's Note of Rule 613(b) in determining that trial courts have discretion to impose the prior foundation requirements of the Rule in *Queen Caroline's Case*, despite the plain meaning of Rule 613(b). *Sutton*, 41 F.3d 1257. In that case, the defendant, Eugene Sutton, appealed from the trial court's exclusion of a witness presenting extrinsic evidence of a prior inconsistent statement attributed to the government's key witness, Mr. Smith. *Id.* at 1260. The trial court based its decision on the fact that defense counsel did not confront Mr. Smith with the inconsistency on cross-examination. *Id.* The Eighth Circuit recognized that Rule 613(b) had "relaxed" the requirement of a prior foundation but noted that this "relaxed" procedure "is not mandatory, but is optional at the trial judge's discretion." *Id.* The court continued, "[S]ince this circuit has never adopted the rule in *Barrett*, we cannot say that the district court abused its discretion in not applying it." *Id.* The problem with this reasoning, however, is that Rule 613(b) eliminated the requirement of a prior foundation, whether the Eighth Circuit had previously adopted it or not. Thus, the decision in *Schnapp* is undermined by the court's reliance on the weak reasoning of *Sutton*.

In addition to cases like *Schnapp*, which cite to unidentified discretion to exclude extrinsic evidence of a prior inconsistent statement properly introduced under Rule 613(b), other federal courts of appeals have similarly upheld exclusion, but under Rule 611(a) and Rule 403.¹⁷¹ Some courts have found the basis for excluding extrinsic evidence of a prior inconsistent statement grounded in a court's discretion under Rule 611(a)¹⁷² to exercise reasonable control over the mode and order of examining witnesses and presenting evidence to avoid wasting time and to protect the witness from harassment and undue embarrassment.¹⁷³ Other courts cite the discretion afforded by Rule 403's caveat that even relevant evidence may be excluded if, for example, the evidence will confuse the jury.¹⁷⁴ Still other courts have affirmed the exclusion of such evidence by steadfastly maintaining the prior foundation requirements of common law in direct contravention of Rule 613(b)'s plain language.¹⁷⁵ None of these rationales is sound.

171. *E.g.*, *United States v. Hudson*, 970 F.2d 948, 956 n.2 (1st Cir. 1992); *United States v. Marks*, 816 F.2d 1207, 1210–11 (7th Cir. 1987); *United States v. Alvarez*, No. 91 CR 279-5, 1991 WL 259008, at *2 (N.D. Ill. Nov. 6, 1991) (citing *Marks*, 816 F.2d at 1207); *see also, e.g.*, *PARK & LININGER*, *supra* note 6; *WRIGHT & GOLD*, *supra* note 57 (“[W]here the potential costs of abandoning the traditional approach are high, the courts and commentators conclude there is power under Rule 611(a) to require the impeaching party to adhere to the traditional approach or risk exclusion of the prior inconsistent statement under Rule 403.” (citations omitted)).

172. Rule 611(a) provides:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) **Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

FED. R. EVID. 611(a).

173. *E.g.*, *Hudson*, 970 F.2d at 956 n.2 (maintaining that Rule 613(b) does not require prior opportunity to explain or deny, but noting that Rule 611(a) does give trial courts discretion to require prior foundation “when such an approach seems fitting”); *see also* *PARK & LININGER*, *supra* note 6 (trial court has discretion under Rule 611(a), as well as Advisory Committee’s Note, to exclude extrinsic evidence of a prior inconsistent statement where the prior foundation was not laid).

174. *E.g.*, *Marks*, 816 F.2d at 1210–11 (affirming trial court’s decision disallowing extrinsic evidence of prior inconsistent statement to avoid jury confusion); *Alvarez*, 1991 WL 259008, at *2 (citing *Marks*, 816 F.2d at 1210–11, in requiring impeaching party to first show extrinsic evidence of prior inconsistent statement to witness to prevent jury confusion); *see also, e.g.*, *FISHMAN*, *supra* note 75; *PARK & LININGER*, *supra* note 6.

175. *E.g.*, *Dierling*, 131 F.3d at 733 (“Rule 613(b) allows impeachment by prior inconsistent statement only when a witness is first provided an opportunity to explain the statement.”); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989) (finding that, under Rule 613(b), “before a prior inconsistent statement may be introduced, the party making the statement must be given the opportunity to explain or deny the same.”); *United*

Courts that impose a prior foundation requirement without explanation appear to do so in obvious disregard for the plain meaning of the Rule and the drafters' intent. In *United States v. Dierling*, for example, the U.S. Court of Appeals for the Eighth Circuit affirmed the decision of the trial court refusing to allow extrinsic evidence of a prior inconsistent statement where the witness was not first given an opportunity to explain the inconsistency.¹⁷⁶ In that case, the defendant Mark Perkins was convicted of conspiracy to manufacture, distribute, and possess with intent to distribute methamphetamine.¹⁷⁷ At issue was the admissibility of the report of a DEA agent to impeach Michelle Crawford, a government witness.¹⁷⁸ The report contained the agent's account of his interview with Ms. Crawford, wherein she stated that Mr. Perkins had killed Danny Craig and told her that he fed his body to some hogs.¹⁷⁹ Despite possessing this report during the cross-examination of Ms. Crawford, the Defendant never mentioned it.¹⁸⁰ When the Defendant attempted to introduce the report during the testimony of the DEA agent who created it, the trial court excluded the report.¹⁸¹ The Eighth Circuit affirmed the decision of the trial court, providing no explanation other than the inaccurate statement that "Rule 613(b) allows impeachment by prior inconsistent statement only when a witness is first provided an opportunity to explain the statement."¹⁸² This is in clear contravention of the Advisory Committee Note to Rule 613(b), which relaxes the requirement that the witness be provided the opportunity to explain the prior inconsistent statement *before* being impeached with it.¹⁸³

Claims that a court has discretion pursuant to Rule 611(a) to exclude extrinsic evidence of a prior inconsistent statement that otherwise conforms to Rule 613(b) are similarly weak.¹⁸⁴ The Advisory Committee drafted Rule 613(b) fully aware of the discretion

States v. Cutler, 676 F.2d 1245, 1249 (9th Cir. 1982) (affirming decision to exclude extrinsic evidence of prior inconsistent statement where witness was not first asked about inconsistency on cross-examination).

176. *Dierling*, 131 F.3d at 733.

177. *Id.* at 728.

178. *Id.* at 733.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. See *supra* note 83 and accompanying text.

184. In *Nachtsheim v. Beech Aircraft Corp.*, for example, the Seventh Circuit affirmed the decision of the trial court excluding extrinsic evidence of a witness's prior inconsistent statement where the witness was not first permitted to explain or deny the statement. The Seventh Circuit found it was within the trial court's discretion to control the mode and order of examinations and evidence under Rule 611(a). 847 F.2d 1261, 1276 (7th Cir. 1988).

conferred by Rule 611(a);¹⁸⁵ if it had intended that a court would exercise such discretion to exclude extrinsic evidence of prior inconsistent statements, it would not have bothered with 613(b). The Advisory Committee recognized that the Rule in Queen Caroline's Case saves time but chose to adopt Rule 613(b) anyway.¹⁸⁶ If it had thought that Rule 611(a), which specifically cites time-saving as a reason for disregarding many rules of evidence, could prevent the application of Rule 613(b), it would never have written Rule 613(b) at all; time-saving could be cited to defeat every attempt to enforce Rule 613(b). Since the Advisory Committee enacted Rule 613(b), it clearly contemplated that a court would not exercise the discretion of Rule 611(a) to defeat the Rule.

The discretion of Rule 403 is an equally invalid justification for imposing a prior foundation requirement on the introduction of extrinsic evidence of a prior inconsistent statement. In *United States v. Marks*, for example, the U.S. Court of Appeals for the Seventh Circuit affirmed a ruling of the trial court requiring the Defendant to show multiple witnesses a particular form from which defense counsel was reading before impeaching them with it.¹⁸⁷ The court noted that Rule 613(b) specifically abolished the traditional foundation requirement of the Rule in Queen Caroline's Case.¹⁸⁸ Nonetheless, the court determined that the trial judge was within his discretion when he insisted that the witnesses be given a chance to explain or deny the statements before being impeached with them in order to prevent jury confusion.¹⁸⁹ The court noted that it would be inappropriate for a court to choose to apply the common law rule instead of Rule 613. Nonetheless, the court suggested that a trial judge "is entitled to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and jurors."¹⁹⁰

The U.S. District Court for the Northern District of Illinois also relied on Rule 403 to invalidate Rule 613(b) in *United States v. Alvarez*.¹⁹¹ In that case, the court required defense counsel to first show the witness the FBI reports counsel intended to use to impeach him

185. See generally Scallen, *supra* note 71, at 602–09 (discussing the historical context within which the Federal Rules of Evidence were drafted).

186. See *United States v. Barrett*, 539 F.2d 244, 255 (1st Cir. 1976) (quoting *Rules of Evidence (Supplement): Hearing on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 74-75 (1973) (statement of Edward W. Cleary, Reporter, Comm. on Rules of Practice & Procedure of the Judicial Conf. of the U.S.)).

187. 816 F.2d 1207, 1210 (7th Cir. 1987).

188. *Id.*

189. *Id.* at 1211.

190. *Id.*

191. No. 91 CR 279-5, 1991 WL 259008, at *2 (N.D. Ill. Nov. 6, 1991).

where counsel was “waving the FBI reports in front of the jury while walking directly in front of them, and was reading extensive passages from those reports.”¹⁹² The court relied on the Seventh Circuit’s ruling in *United States v. Marks* to support its decision, including that court’s reasoning that the Rule in Queen Caroline’s Case may be appropriate, despite Rule 613, to avoid confusing the jury.¹⁹³

Such opinions wrongly suggest that a court’s discretion under Rule 403 could render Rule 613 inapplicable. The discretion of Rule 403 is even broader than that of Rule 611(a).¹⁹⁴ For the reasons explained above, a court should not exercise that discretion to exclude extrinsic evidence of a prior inconsistent statement to save time.¹⁹⁵ Nonetheless, there are certainly limited situations where the exercise of Rule 403 could be appropriate to exclude prior inconsistent statements, but only on a basis other than saving time.¹⁹⁶

C. A Middle Ground: The Unique Approach of the Third Circuit

Unlike those courts applying Rule 613(b) as written,¹⁹⁷ courts imposing the Rule in Queen Caroline’s Case under any analysis typically do so without determining that the witness is unavailable for recall.¹⁹⁸ The United States Court of Appeals for the Third Circuit, however, has taken a different approach altogether. Like the

192. *Id.* at *2.

193. *Id.* at *2 n.2.

194. Rule 403 provides:

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

FED. R. EVID. 403.

195. *See supra* note 186 and accompanying text.

196. *See, e.g.,* *United States v. Marks*, 816 F.2d 1207, 1211 (7th Cir. 1987) (finding that impeaching attorney waving papers around while questioning about a prior inconsistent statement before introducing the prior statement confused the jury); *Alvarez*, 1991 WL 259008, at *2 (requiring impeaching attorney to show prior statement to witness before continuing cross-examination because counsel’s actions of waving papers around and reading from them caused jury confusion).

197. *See supra* note 113.

198. *See supra* note 157; *see, e.g.,* *United States v. Schnapp*, 322 F.3d 564, 571–72 (8th Cir. 2003); *United States v. Dierling*, 131 F.3d 722, 733 (8th Cir. 1997); *United States v. Sutton*, 41 F.3d 1257, 1260 (8th Cir. 1994); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989); *Marks*, 816 F.2d at 1211; *United States v. Elliott*, 771 F.2d 1046, 1051 (7th Cir. 1985).

courts in the First, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits, the Third Circuit recognizes that Rule 613(b) imposes no prior foundation requirement.¹⁹⁹ Like the Second, Fourth, Eighth, and Tenth Circuits, however, the Third Circuit excludes extrinsic evidence of a prior inconsistent statement where the proponent of the evidence has not confronted the declarant with the statement on cross-examination and has not later recalled the available declarant to explain or deny the statement.²⁰⁰ The difference in the Third Circuit's approach is that, like those courts that do not require a prior foundation, the Third Circuit considers the availability of the declarant witness for recall after the court has excused him.²⁰¹ But, unlike the other circuits that follow Rule 613(b), the Third Circuit puts the burden of recalling the witness to provide an opportunity to explain or deny the inconsistency on the proponent, rather than the opponent, of the prior inconsistent statement.²⁰²

Although at odds with the majority of circuit courts, which place the burden of recall on the opponent of a prior inconsistent statement,²⁰³ the Third Circuit's approach is in harmony with the text of Rule 613(b). Specifically, Rule 613(b) states that extrinsic evidence of a prior inconsistent statement is admissible "if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it."²⁰⁴ The Rule is silent as to which party has the burden to provide the witness the opportunity to explain or deny the statement.²⁰⁵ Nonetheless, that burden is juxtaposed with the opportunity to examine the witness specifically provided to the opponent of the evidence. Read in context, the Rule implies that the party other than the opponent of the evidence—namely, the proponent of the evidence—bears the responsibility of allowing the witness to explain or deny the inconsistent statement. Although this interpretation of Rule 613(b) is at odds with the majority of circuit courts, it is an equally valid interpretation.

But see Wammock v. Celotex Corp., 793 F.2d 1518, 1522–23 (11th Cir. 1986) (affirming exclusion of extrinsic evidence of prior inconsistent statement where impeaching attorney failed to confront witness with inconsistency on cross-examination *because* witness was unavailable for recall).

199. *E.g.*, United States v. Green, 556 F.3d 151, 158 (3d Cir. 2009); United States v. DeLaurentis, 47 F. App'x 170, 172 (3d Cir. 2002).

200. *E.g.*, Green, 556 F.3d at 158; DeLaurentis, 47 F. App'x at 172.

201. *E.g.*, Green, 556 F.3d at 158; DeLaurentis, 47 F. App'x at 172.

202. *E.g.*, Green, 556 F.3d at 158; DeLaurentis, 47 F. App'x at 172.

203. *See supra* note 113.

204. FED. R. EVID. 613(b).

205. *Id.*

Ultimately, federal circuit courts are torn in their application of Federal Rule of Evidence 613(b). A majority applies the Rule in accordance with its plain meaning and the drafters' intent.²⁰⁶ A minority holds fast to the prior foundation requirement of the Rule in Queen Caroline's Case.²⁰⁷ Still another court applies a unique, but valid, interpretation all its own that lies somewhere between the two competing interpretations.²⁰⁸

IV. THE ADVISORY COMMITTEE SHOULD ENFORCE RULE 613(b) AS ORIGINALLY ENACTED

The circuit split among U.S. courts of appeals over whether the Rule in Queen Caroline's Case remains applicable²⁰⁹ is an obstacle to the uniform application of Rule 613(b).²¹⁰ Yet, the obstacle to uniform application is not found in the Rule itself, and thus should not cause the Advisory Committee to amend the rule. The Advisory Committee Evidence Rules instituted a philosophy in 1994 that it would not amend a rule "absent a showing either that it is not working well in practice or that it embodies an erroneous policy decision."²¹¹ The Advisory Committee explained that any amendment in the Rules of Evidence "'will create new uncertainties as to interpretation and unexpected problems in practical application.'"²¹² There is no evidence that Rule 613(b) does not work well when applied according to its plain meaning; there is no ambiguity in its terms. Rather, Rule 613(b) does not work well when ignored by courts and supplanted with an archaic common law rule.

Between Rule 613(b) and the Rule in Queen Caroline's Case, it is the common law rule that embodies an erroneous policy decision. After all, this was a rule developed to suit the needs of a King seeking to divorce his wife, unconcerned that she might receive a death sentence as a result.²¹³ The objection that resulted in the Rule had no applicability to the context in which it was made because the prior inconsistent statements were not offered for the

206. See *supra* Part III.A.

207. See *supra* Part III.B.

208. See *supra* Part III.C.

209. See *supra* note 112.

210. See, e.g., FISHMAN, *supra* note 75; PARK & LININGER, *supra* note 6.

211. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1680 (1995).

212. *Id.* (quoting FED. R. APP. P. 25(a)(2)(D) (proposed amendments)).

213. See *supra* notes 28–34 and accompanying text.

truth of the matter asserted.²¹⁴ Because that objection was so untimely, the most worthy argument against the court's ruling—that to show the witness the extrinsic evidence before confronting her with it would disable the impeaching attorney's ability to effectively discredit her—was never made since it was, by that time, moot.²¹⁵ The court that created the Rule did so after only ten minutes of deliberation and relied on no precedent.²¹⁶ England recognized that the Rule in Queen Caroline's Case was erroneous shortly after the Rule became law, and it abandoned the Rule thirty-four years later.²¹⁷

Meanwhile, the policy reasons behind the Advisory Committee's thoughtfully drafted Rule 613(b) remain valid. The element of surprise in impeachment is still useful in a jury's assessment of the declarant witness's credibility and, thus, remains an important tool in the trial lawyer's toolbox.²¹⁸ Concern for fairness to opposing counsel is mitigated by Rule 613(a)'s requirement that the impeaching attorney provide a copy of an inconsistent statement to opposing counsel upon request.²¹⁹ Similarly, Rule 613(b) satisfies the concern for fairness to the witness by requiring that the witness be given an opportunity to explain or deny the inconsistency *at some point*.²²⁰ Moreover, concern for a witness's embarrassment at being confronted with a prior inconsistent statement supported by evidence available to opposing counsel²²¹ misses the mark; one should be more concerned with the jury's ability to assess that witness's credibility. Finally, the amount of time saved by avoiding recalling the declarant witness is not so significant to outweigh the benefits of allowing the jury to witness the confrontation in whatever dramatic way counsel chooses. At the very least, there is no reason to believe that time-saving has decreased since the Advisory Committee drafted the Rule in 1969.

If the Advisory Committee feels strongly that some action must be taken, it should do so with the aim of promoting enforcement of, rather than drastically altering, the current rule. This could be accomplished by revising Rule 613(b) in two ways.

214. See *supra* note 39.

215. See *supra* notes 39–42.

216. See *supra* note 43 and accompanying text.

217. See, e.g., Broadhead, *supra* note 37, at 252; Stern & Grosh, *supra* note 13, at 167; Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, § 24 (Eng.).

218. See *supra* notes 102–03 and accompanying text.

219. See *supra* note 96 and accompanying text.

220. See *supra* note 97 and accompanying text.

221. See *supra* note 58 and accompanying text.

First, the Advisory Committee could amend Rule 613(b) to include the witness's availability directly in the text of the rule itself. The Committee need not look further than Rule 804(a) for a useful definition of "unavailability."²²² For hearsay purposes, a declarant is unavailable as a witness in five distinct circumstances.²²³ The first type of unavailable witness exists where the court holds that an applicable privilege exempts the witness from testifying about the statement at issue.²²⁴ Next is the witness who refuses to testify about the statement despite a court order to do so.²²⁵ The third category of unavailable witnesses includes those who testify that they cannot remember the statement at issue.²²⁶ Another type of unavailable witness includes those who have died or suffer from a physical or mental illness that prevents them from physically appearing in court.²²⁷ Finally, a witness is unavailable where attempts to require his attendance through legal process have failed.²²⁸ Of course, even if one of the aforementioned circumstances exists, a witness is not unavailable where his absence was caused by the proponent of the statement in an attempt to prevent the witness from appearing.²²⁹

By including the definition of unavailability from Rule 804(a) in Rule 613(b), the Advisory Committee can eliminate whatever confusion exists concerning the significance of a witness's availability for recall. Specifically, the Advisory Committee could amend Rule 613(b) as follows:

Rule 613. Witness's Prior Statement

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. *This subdivision (b) is satisfied regardless of the timing of the witness's opportunity to explain or deny the statement where the witness is not unavailable for recall as defined under Rule 804(a).* This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

222. FED. R. EVID. 804(a).

223. *Id.*

224. FED. R. EVID. 804(a)(1).

225. FED. R. EVID. 804(a)(2).

226. FED. R. EVID. 804(a)(3).

227. FED. R. EVID. 804(a)(4).

228. FED. R. EVID. 804(a)(5).

229. FED. R. EVID. 804(a).

Such a change does no more than the Rule currently does, but it eliminates the confusion of some courts as to whether following the Advisory Committee Note is mandatory or permissive. Such an amendment makes it clear that the Rule in Queen Caroline's Case is not the law in federal courts and has not been for some time.

Second, the Advisory Committee could consider adding an Advisory Committee Note limiting the exercise of a court's discretion to exceptional circumstances concerning the timing for laying the foundation required for the admission of extrinsic evidence of a prior inconsistent statement. Specifically, for the reasons explained in Part III.B of this Article, the drafters of Rule 613(b) did not intend that a court could undermine the effectiveness of Rule 613(b) by applying the discretion of Rule 611(a).²³⁰ A new Advisory Committee Note could provide as follows:

Subdivision (b). The original drafters of Rule 613(b) recognized that the Rule of Evidence marked a departure from the prior time-saving foundation requirement of the common law Rule in Queen Caroline's Case. Rule 613(b), thus, represents a conscious decision to accept a less time-efficient alternative over an unnecessary common law rule. Courts applying Rule 613(b), therefore, should use caution in exercising the discretion provided to them under Rules 611(a) or 403 to achieve saving time because that policy goal is outweighed by the countervailing policy goals motivating the drafters of Rule 613(b). If a court were to use the discretion of Rules 611(a) or 403 to require a common law prior foundation to achieve saving time, Rule 613(b) could be avoided in every circumstance. The court's discretion under Rules 611(a) and 403 otherwise remains in full effect.

An Advisory Committee Note to this effect should cause courts to pause before requiring the prior foundation of Queen Caroline's Case in order to achieve saving time.

There is one legitimate criticism of Rule 613(b) as currently drafted: it fails to identify which party is responsible for providing the witness an opportunity to explain or deny a prior inconsistent statement after it is introduced.²³¹ The Advisory Committee could amend the Rule to specify whether the proponent or the opponent of the evidence must provide that opportunity. However, the disagreement over which party bears this burden is more in the nature

230. See *supra* notes 184–86 and accompanying text.

231. See *supra* notes 201–05 and accompanying text.

of a true circuit split, rather than a misinterpretation of a rule of evidence. It is therefore best left for the Supreme Court to resolve, should that body be interested in the matter.

CONCLUSION

The Rule in *Queen Caroline's Case* has a fascinating history, but its time for use in federal practice has long since faded. Rule 613(b) is an effective rule that accomplishes nearly all of the goals of the common law rule without impeding cross-examination. The only problem with Rule 613(b) is the refusal of a minority of courts to enforce it as plainly written. The Advisory Committee should not consider amending the Rule, which a majority of U.S. courts of appeals follow, to accommodate the weak interpretation of a few courts. The Advisory Committee should take no action concerning Rule 613(b). However, should the Committee feel compelled to address the circuit split with an amendment to the Rule, it should act to strengthen the enforcement of Rule 613(b) as its drafters intended and as courts have applied it for over thirty-five years.